IN THE

Supreme Court of the United States

October Term, 1942

No. 332

LE ROY J. LEISHMAN,
Petitioner,

vs.

ASSOCIATED WHOLESALE ELECTRIC COMPANY,
a corporation,
Respondent.

BRIEF FOR RESPONDENT.

SAMUEL E. DARBY, JR.,
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MARSTON ALLEN,
ALDEN D. REDFIELD,
Of Counsel.

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APPENDIX

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Opinions in the Courts Below.

The opinion of the District Court is reproduced in Vol. I, pp. 19 *et seq.*, and is reported in 36 F. Supp. 804.

The opinion of the Circuit Court of Appeals is reproduced in Vol. IV, pp. 684 *et seq.*, and is reported in 128 F. (2d) 204.

Statement of the Case.

Because petitioner's brief omits a Statement of the Case, we herewith present one.

1. This is a patent infringement suit involving claims 7, 8, 9, 10 and 11 of Reissue Patent No. 20,827.

2. The opinion of the District Court was filed on January 31, 1941, holding these five claims of the patent to be invalid, and stating:

> "consequently, it becomes unnecessary to consider the other defenses raised by the defendant" (Vol. I, p. 32).

3. On April 28, 1941 an order (consented to by respondent) was entered to the effect that:

> "in the event entry of judgment be made herein prior to May 21, 1941, the time be enlarged during which a motion may be filed under Rule 52b, to and including May 31, 1941" (Vol. I, p. 40).

4. On May 1, 1941 the Findings of Fact and Conclusions of Law were filed (Vol. I, pp. 33-37). These concluded with the finding (No. 23, p. 37) that the five claims of the patent

> "do not embody any invention over the prior art";

and the conclusions of law included (No. 1, p. 37) that these claims

> "are invalid for want of invention".

5. On the same day, viz.: *May 1, 1941,* the final judgment was entered, holding the five claims of the patent to be

> "invalid for want of invention"

and dismissing the complaint (Vol. I, p. 38).

6. On *May 28, 1941* (27 days after the judgment) petitioner filed a motion (Vol. I, pp. 42-47) entitled "Motion under Rule 52(b) of the Rules of Civil Procedure for the District Courts of the United States" seeking nine specific amendments to the findings of the Trial Court, including, with respect to Finding No. 23 above referred to, a revision thereof so that it would read:

> "Claims 7, 8, 9, 10 and 11 of the Reissue Patent No. 20,827 define invention over the prior art."

This, it will be noted, is diametrically opposite to the finding of the Trial Court which was, as above stated, that those claims did *not* embody any invention over the prior art. In addition, a tenth amendment was sought seeking supple-

mental findings (Nos. 24-27 inclusive), to the effect that (24) a challenged structure of respondent was an infringement, (25) the reissue patent was for the same invention as the original patent, (26) the disclaimers filed in connection with claims 8, 9 and 10 were valid, and (27) that the reissue patent was a narrowing one and respondent was possessed of no intervening rights. It will be noted that none of these supplemental findings were directed to or affected in any respect the judgment of invalidity of the patent claims for want of invention.

The motion concluded with the statement (Vol. I, p. 46):

> "Consistently with these findings, the conclusions of law should be amended to state that claims 7, 8, 9, 10 and 11 of reissue letters patent No. 20,827 in suit, are valid; that an injunction shall issue in the usual form, and that there be an accounting for past infringement."

From this it will be seen that although the title of the motion expressly limited it to one "under Rule 52(b)", and although the form and substance thereof were confined to solicited amendment of and supplements to the findngs of fact by the Trial Court without affecting in any way the judgment that had been entered, the requested amendment of Finding No. 23, as well as the above quoted request for amendment of the conclusions of law were in the nature of a request for a new trial by way of a reconsideration of the evidence before the Court (as distinguished from a new trial on any *new* or *different* evidence).

7. This motion was denied on June 9, 1941 (Vol. I, p. 47).

8. Notice of appeal "from the final judgment entered in this action" was filed on September 4, 1941—*4 months and 3 days after the entry of the judgment* (Vol. I, p. 48).

The Question Presented.

It is believed that petitioner misstates the question here presented, because, while it is true that petitioner's motion under Rule 52(b) to amend the findings did contain a request for supplemental findings (Nos. 24-27 inclusive), even if those proposed supplemental findings had been adopted by the Trial Court they would not have affected or altered the judgment that the patent was invalid for want of invention. Therefore, the statement contained in the alleged "Question Presented" (Petitioner's Brief p. 1) that the "request for *additional* findings [if granted] would have required corresponding amendment of the judgment" simply is not so.[1]

Consequently, the real and only question presented in this case is whether or not a motion under Rule 52(b) of the Rules of Civil Procedure to amend the findings of the Trial Court tolls the statutory period within which an appeal may be taken from a final judgment; and, in addition, if any part of said motion is capable of interpretation as a motion for a *new trial* by way of a reconsideration of the evidence before the Court, a secondary question is presented, namely, whether or not such a motion is timely when brought more than 10 days subsequent to the judgment in contravention of Rules 6 and 59(b) of the Rules of Civil Procedure.

Argument.

It is elementary that the statute limiting the time within which an appeal from a final judgment may be taken is mandatory and jurisdictional, and that the time fixed by the statute begins to run from the date of the entry of the judgment, and cannot be extended by waiver, agreement of the parties, or by order of the Court (*United States* v.

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[1] Emphasis ours throughout this brief.

Mayer, 235 U. S. 55; *George* v. *Victor Talking Machine Co.*, 293 U. S. 377).

Consequently, the final judgment having been entered in this case on May 1, 1941 (Vol. I, p. 38), the time permitted by statute for appeal therefrom expired on *August 1, 1941* (U. S. C. A., Title 28, Section 230)[2] unless something intervened, permissible under the Rules of Civil Procedure, which tolled the statute.

The Rules of Civil Procedure.

Rule 1. Scope of Rules.[3]

Rule 1 expressly provides that the rules "shall be construed to secure the just, *speedy*, and inexpensive determination of every action".

Rule 59. New Trials.[4]

In keeping with the underlying principle of the rules favoring *speedy* justice, Rule 59, pertaining to "New Trials", states (in Section (b) thereof) with respect to the *time* for bringing a motion for a new trial, that such motion *must* be brought *within 10 days after the entry of the Judgment*, with a single exception if such motion is based on the ground of newly discovered evidence—a condition with which we are not here concerned.

Rule 6. Time.[5]

Rule 6(b) provides that all "time" prescribed or allowed by the rules *may* be enlarged by the Court, with two exceptions, namely, the Court "may *not* enlarge"

(1) "the period for taking any action *under Rule 59*, except as stated in sub-division (c) thereof" (having

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[2] Appendix, p. 9.
[3] Appendix, p. 9.
[4] Appendix, p. 10.
[5] Appendix, p. 9.

to do with the filing of affidavits—a matter with which we are not here concerned); or

(2) "*the period for taking an appeal* as provided by law".

Thus, this rule expressly excludes from the power of the Court the ability to extend, after final judgment, the period prescribed by statute within which an appeal may be taken, as well as the period within which a motion may be filed for a new trial (reconsideration or rehearing on the *same* evidence).

Rule 52. Findings by the Court.[6]

Paragraph (b) of this rule, under the sub-title "Amendment", prescribes:

> "Upon motion of a party *made not later than 10 days* after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59."

From this it will be seen that a motion to amend or supplement the findings upon which a judgment is based is required to be filed within 10 days after the judgment. However, because the time prescribed by this rule is not expressly excluded by the prohibitions of Rule 6(b), the District Court unquestionably is vested with the discretionary power to extend this time insofar as mere amendment or supplement to the findings is concerned. The rule expressly provides, however, that a motion to amend or supplement the findings may be *combined* with a motion for a new trial under the provisions of Rule 59. It is believed to be obvious that if such a *combined* motion is made the 10 day limit of

[6] Appendix, p. 10.

the time within which to make such a motion, insofar as it seeks reconsideration or new trial, may *not* be extended because of the specific prohibition of Rule 6(b).

In other words, it is clear that a motion to amend or supplement the findings, under Rule 52(b), regardless of when brought, would not toll the time for appeal from a final judgment unless, as a result thereof, the judgment was amended. Therefore, it is within the discretionary power of the Court to extend the time for bringing such a motion. On the other hand, a motion under this rule, if combined with a motion under Rule 59, *must* be brought within 10 days after the entry of the final judgment because Rule 6(b) expressly deprives the Court of any power to extend the period for bringing a motion under Rule 59.

Application of the Rules to the Facts in This Case.

The petitioner's motion in this case either was, as stated on its face, a motion under Rule 52(b), the bringing of which in no sense or in any manner tolled the appeal statute, or it was a combined motion under Rules 52(b) and 59. In either case the Court of Appeals below properly dismissed petitioner's appeal as too late.

If petitioner's motion be considered as being confined, as stated, to Rule 52(b), the motion did not, and, without favorable action by the Court thereon, could not toll the appeal statute, with the result that petitioner's notice of appeal, filed September 4, 1941—4 months and 3 days after the entry of the judgment—was too late.

On the other hand, if petitioner's motion, despite its form, is susceptible of being construed, in part, as a motion for a new trial under Rule 59, Rule 6(b) inexorably required that the motion for new trial be filed within 10 days after entry of the judgment. The judgment was entered on May

1st. Petitioner's motion was filed on May 28th—27 days after entry of the judgment. It was 17 days too late.

Obviously, the Court, in entering its order of April 28, 1941 enlarging petitioner's time to file a motion *under Rule 52(b)*, did not, by terms or implication, extend petitioner's time to file a motion *under Rule 59;* nor did the Court have the power to do so.

In any event, the three months period for appeal began to run upon the entry of the final judgment on May 1, 1941. And it necessarily continued to run until that final judgment was vacated or modified, or the time for appeal was tolled by some other action by the Court that was within its judicial powers. None of these things occurred in the present case.

In view of the few foregoing simple facts, it will be self evident that neither the case of *Zimmern et al.* v. *United States*, 298 U. S. 167 (relied upon in petitioner's brief), nor *Fisk et al.* v. *Wallace*, C. C. A. 8, 115 F. (2d) 1003 (relied upon in petitioner's petition for writ of certiorari) is relevant in any respect.

It is believed to be obvious, therefore, that from whatever angle the matter is viewed, petitioner has lost its right of appeal from the final judgment in this case by its failure to appeal, or take other appropriate action, within the time prescribed therefor; and the dismissal of its appeal by the Court of Appeals below was mandatory and jurisdictionally necessary, and should be affirmed.

Respectfully submitted,

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APPENDIX.

U. S. C. A. Title 28, Section 230.

Time for making application for appeal or writ of error. No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree. (Mar. 3, 1891, c. 517, § 11, 26 Stat. 829; Feb. 13, 1925, c. 229, § 8 (c), 43 Stat. 940.)

Rules of Civil Procedure for the District Courts of the United States.

Rule 1. Scope of Rules. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. *They shall be construed to secure the just, speedy, and inexpensive determination of every action.**

Rule 6. Time.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; *but it may not enlarge the period for taking any action under Rule 59, except as stated*

* Emphasis ours.

*in subdivision (c) thereof, or the period for taking an appeal as provided by law.**

Rule 52. Findings by the Court.

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. *The motion may be made with a motion for a new trial pursuant to Rule 59.* When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district an objection to such findings or has made a motion to amend them or a motion for judgment.*

Rule 59. New Trials.

(b) *Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment*, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.*

(c) *Time for Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

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* Emphasis ours.